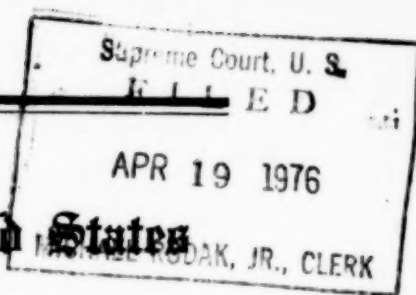


IN THE
Supreme Court of the United States
OCTOBER TERM, 1975



No. 75-1354

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

ARISTEDES A. DAY, et al.,

Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**BRIEF OF RESPONDENTS IN OPPOSITION TO
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Opinions Below

The opinion of the Court of Appeals appears at pages 3-18 of the separate Appendix ("App."), at 13 Avi. 18, 144, and is officially reported at 528 F.2d 31. The opinion of the District Court appears at App. 21-32 and is officially reported at 393 F.Supp. 218.

Questions Presented

1. Where passengers had handed their airplane tickets to employees of the defendant (TWA), had received boarding passes with seat selections on them and baggage checks for their luggage, passed through passport control, proceeded to the transit lounge for international passengers to which they were restricted, and were attacked by Arab

terrorists while they were in line waiting to board the aircraft at a gate to which they were directed by a boarding announcement made by TWA, did the Court below err when it held that the passengers were "in the course of any of the operations of embarking" under Article 17 of the Warsaw Convention?

2. Did the Court below err in concluding that the plain meaning, legislative history, and the underlying purpose of the Warsaw Convention required a determination that TWA must be held liable?

Statement

Respondents¹ seek recovery for personal injuries and wrongful death resulting from an attack by unknown Arab terrorists at the Athens Airport, Athens, Greece, on August 5, 1973 (R 16).²

Prior to August 5, 1973, respondents purchased tickets on TWA's Flight 881, which provided for air transportation from Athens to New York City (R 97, 105a). The aircraft was scheduled to depart Athens Airport at 3:30 P.M. (R 98).

Prior to the scheduled departure time, respondents presented their tickets and luggage to TWA's ticket agent on the upper level of the airport (R 98). The agent removed the tickets from an envelope, and kept the ticket coupons (R 98). He then gave respondents boarding passes with seat selections on them and baggage checks for their luggage (R 98).

¹ All passengers followed essentially the same embarking procedures and they all were similarly situated at the time of injury. For the sake of clarity, however, the facts pertaining to the Kersen passengers will be utilized.

² References preceded by "R" refer to pages of the Record contained in the Appendix submitted to the Second Circuit.

Thereafter, TWA's ticket agent directed the respondents to passport control, which was also on the upper level of the airport (R 98). After their passports were stamped, the respondents proceeded to the transit lounge on field level, where they were required to remain until they boarded the aircraft (R 98, 99). The transit lounge, which was reserved exclusively for departing international passengers, was level with the airport runways and the apron where the plane was parked to receive the passengers (R 98). While they were waiting in the transit lounge, TWA announced and directed passengers for Flight 881 to proceed to Gate 4 to be searched and board the aircraft (R 98, 99).

To board the plane, the respondents were to be personally searched and then were to proceed through the door of the transit lounge for a distance of approximately 100 yards to the aircraft (R 99). At approximately 3:15 P.M., while the respondents were at Gate 4, standing in line to be searched, and just prior to walking out onto the field, several unknown Arab terrorists attacked persons in the waiting room including the respondents with rifles, machine guns and hand grenades (R 99). Prior to said attack, approximately seven passengers were screened and had passed through Gate 4 (R 110). As a result of the attack, Mr. Kersen was killed and all of the respondents sustained personal injuries (R 60, 99).

The Warsaw Convention

The Warsaw Convention applies to "all international transportation of persons [passengers], baggage or goods performed by aircraft for hire." Article 1(1). It is undisputed that the contract of transportation made between the instant passengers and TWA, as set forth in the tickets issued by TWA, provided for "international transportation."

The liability of the carrier under the Warsaw Convention is specifically imposed by Article 17:

"The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger. . . ."

Warsaw's Article 22 limited damages to a maximum of \$8,300 per passenger.

The Montreal Agreement

Many years after this country's adherence to Warsaw (1934), and due to intense dissatisfaction with the inadequate \$8,300 damage limitation, the United States formerly denounced the Warsaw Treaty on November 15, 1965, with the cancellation to take effect six months later. As a result of numerous meetings of air carriers and governments, and in order to induce the United States to withdraw its denunciation of the Warsaw Treaty, the Montreal Agreement³ was created.

Under the Montreal Agreement, TWA waived the \$8,300 limitation contained in Warsaw's Article 22 and agreed to pay up to \$75,000 to each injured or deceased passenger. TWA also waived any defense it might have under Article 20(1) of Warsaw (that the carrier took all necessary measures to avoid the damage or that it was impossible to take such measures). Accordingly, TWA is absolutely liable in the instant cases for damages not to exceed \$75,000 per passenger, irrespective of whether or not TWA was negligent or at fault, if the passengers were injured or killed "in the course of any of the operations of embarking . . ." under Article 17 of the Convention.

³ CAB 18,900, Order E-23680, May 13, 1966.

Proceedings Below

Respondents moved for summary judgment with respect to each claim that alleged TWA's absolute liability up to the sum of \$75,000 based on Article 17 of the Warsaw Convention as supplemented by the Montreal Agreement. Respondents' motions contended that, as a matter of law, the passengers were injured in the course of embarking operations. - TWA cross-moved for summary judgment.

By a memorandum decision dated March 31, 1975 (App. 21-32), the District Court granted respondents' motions for partial summary judgment on the issue of liability and denied TWA's cross-motion for summary judgment.

The District Court certified an interlocutory appeal under 28 U.S.C. § 1292. Permission to appeal was granted by the Second Circuit Court of Appeals on May 9, 1975. The decision of the District Court was affirmed by the Second Circuit on December 22, 1975 (App. 3-18).

REASONS FOR DENYING THE WRIT

1. The Decision Below is Correct.

Respondents submit that the Court below was correct in concluding that the plain meaning of Article 17 and the underlying purpose of the Warsaw Convention dictated finding TWA liable. In so holding, Chief Judge Kaufman rejected TWA's assertion that no terminal building accidents were covered by the phrase "in the course of any of the operations of embarking."

"We are of the view that the words 'in the course of any of the operations of embarking' do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location.

Rather, the drafters of the Convention looked to whether the passenger's *actions* were a part of the operation or process of embarkation, as did Judge Brieant. [Emphasis by the Court.]

"It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the 'operations of embarking' commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were 'in the course of embarking.'" (App. 8, 9.)

Based on selected quotations from the Warsaw Minutes, TWA asserts that the drafters "accepted" (TWA's Petition, page 14) a Brazilian proposal to have the liability of the carrier begin when the passenger embarks on the aircraft, rather than the proposal of CITEJA⁴ which would have made the carrier liable as soon as the traveler en-

⁴ Comité Internationale Technique d'Experts Juridique Aériens, the committee of experts appointed to prepare a draft convention for consideration by the Warsaw delegates.

tered into the aerodrome of departure. No fair-minded reader of the Warsaw Minutes could come to this conclusion. Based upon its reading of the Warsaw Minutes, the Second Circuit stated the following:

"Prof. Georges Ripert, the French delegate, however, forcefully argued against both the CITEJA and the Brazilian proposals. It was, he observed, virtually impossible to draft a precise formula that would satisfactorily cover the myriad of cases that could arise. Prof. Ripert proposed that the article be recast in terms broad enough to allow the Courts to take into account the facts of each case. See Warsaw Minutes at 49-50, 53-54 [said pages correspond to App. Pages 79-81, 85-87]. The delegates voted to reject the CITEJA draft and to accept the French suggestion. *Id.* at 57 [which corresponds to App. 90]. The drafting committee then rewrote the CITEJA proposal in the form now set forth in Article 17.

"The Minutes of the Warsaw proceedings thus undermine TWA's contention that the delegates wished to implement a rigid rule based solely on location of the accident. Rather, we believe they preferred to provide latitude for the Courts to consider the factual setting of each case by considering the elements we have referred to above." (App. 11-12).

In sum, the Second Circuit did not pay "lip service" (page 7 of TWA's Petition) to its duty, but thoroughly considered and analyzed the language of Article 17, its legislative history and the underlying purposes of the Warsaw Convention in concluding that the instant passengers were "in the course of embarking."

⁵ The Second Circuit was here referring to a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction), and location.

2. The Decision Below Does Not Conflict With the Decision of Any Circuit Court of Appeal.

The decision below is not "substantially in conflict" (TWA's Petition, page 8) with *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971). In *MacDonald*, an elderly passenger fell after she had disembarked and while she was in the baggage claim area. *MacDonald* held that she had not proved an "accident," as required by Article 17. The Court then stated, in *dicta*, that it would seem that a passenger could recover against the airline under Article 17 for events occurring up to reaching a safe point inside the terminal. The Court specifically indicated that it was not setting forth a general rule concerning when liability commenced under Article 17:

"Without determining where the exact line occurs, it has been crossed in the case at bar." 439 F.2d at 1405.^o

^o Judge Gignoux considered *In Re Tel Aviv*, 13 Avi. 18,166 (D.P.R. 1975), to be substantially on all fours with *MacDonald* and, therefore, controlled by said decision. *Klein v. KLM Royal Dutch Airlines*, 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974), was also a disembarking case in which the plaintiff sustained injury in the baggage claim area of the airport. In *Felismina v. Trans World Airlines, Inc.*, 13 Avi. 17,145 (S.D.N.Y. 1974), the District Court simply concluded that "by the time plaintiff boarded the down escalator she had disembarked from defendant's aircraft."

Cf. *Mache v. Air France* (App. 59-64), a disembarking case which states, in *dicta*, that Article 17 only applies to operations on the traffic apron, with *Blumenfeld v. BEA*, 11 ZLW 78 (Berlin Court of Appeals 1962), which held that Article 17 covered a passenger who fell down a staircase leading from the terminal to the traffic apron because

"the air carrier commits the flight passengers under his care when he requests them to go from the waiting room to the aircraft. Already at that time the air carrier begins to carry out the transportation contract the essential accessory obligation of which consists in providing for the safety of the passengers in every respect and in securing the traffic which was begun." App. 70.

Chief Judge Kaufman considered *MacDonald* to be:

"clearly distinguishable. . . . Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation." (App. 9.)

CONCLUSION

For the foregoing reasons, TWA's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

MELVIN I. FRIEDMAN, an attorney for the respondent Kersen and a member of the Bar of this Court, certifies that on April 14, 1976, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served by mail upon all parties required to be served as follows:

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